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No. 330.

HORACE E. MULLAN, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

JOHN GOODE,
Attorney for Appellant.

W. H. MOORE & Co., Prints., 511 Eleventh St. N. W.

It is so apparent that the plaintiffs in error, throughout the whole case, have been endeavoring, on the slightest pretext, to throw obstacles in the way of their less pecunious creditor's in collecting a just debt, that the court will be justified in holding that the writ of error was sued out merely for delay, and in affirming the judgment with damages.

ORRIN B. HALLAM,

Attorney for Defendant in Error.

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This is a suit brought by Horace E. Mullan to recover judgment against the United States for the sum of $4,361.53, the amount of pay alleged to be wrongfully and illegally witheld from him as a commander in the Navy of the United States, from the 7th day of July, 1883, to the 1st day of June, 1885.

The Court of Claims on the 3d day of January, 1888 adjudged, ordered and decreed that the petition of the claimant be dismissed. And thereupon the claimant, by his attorneys, made application and gave notice of an appeal to this court which was allowed on the 24th day of January, 1888.

ERROR ASSIGNED.

It was error in the court below to dismiss claimant's petition.

ARGUMENT.

Upon the facts as found by the Court of Claims, we submit that the claimant did not have a fair and impartial trial; that he had no day in court because in legal contemplation there was no court, and that the sentence of the so-called court dismissing him from the naval service was, to all intents and purposes a nullity. If the court was so organized as to be illegal it did not acquire jurisdiction of the person of the accused, or, of the subject-matter. There must be jurisdiction to hear and determine the cause and to pronounce sentence. Before there can be a judgment there must be a legally constituted court and that court must have jurisdiction of the subject-matter as well as of the person or the proceedings will be *coram non judice* in all places and under all circumstances. Every act of a court beyond its jurisdiction is null and void.

Ex parte Alvin R. Reed, 100 U. S. 13.

In Runkle's case, decided in May, 1887, this court through Chief Justice Waite said: "A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. * To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with and that its sentence was conformable to law. * * * There are no presumptions in its favor so far as these matters are concerned."

In Wales *vs.* Whitney, 114 U. S. 564, Mr. Justice Miller, in delivering the opinion of the court said:

"In thus deciding we are not leaving the appellant without remedy if his counsel are right in believing the court-martial has no jurisdiction of the offence of which he is charged. He can make that objection to that court before trial. He can make it before judgment, after all the facts are before that court. He can make it before the reviewing tribunal. If that court finds him guilty and imposes imprisonment as a part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit."

We propose to inquire into the jurisdiction of the so-called court-martial which undertook to dismiss the appellant from the naval service.

The fifth section of the Army Appropriation act of July 13, 1866, (14 Stats. at Large, 92,) provides that—

"No officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon, and in pursuance of, the sentence of a court-martial to that effect or in commutation thereof."

Article 39, section 1624 R. S., 283, reads as follows:

"A general court-martial shall consist of not more than thirteen nor less than five commissioned officers; and as many officers, not exceeding thirteen, as can be convened without injury to the service shall be summoned on every such court. *But in no case where it can be avoided without injury to the service shall more than one-half, exclusive of the president, be junior to the officer to be tried.* The senior officer shall always preside, and the others shall take place according to their rank."

The record in this case shows that the claimant was tried by a court consisting of seven members, five of whom were his juniors in rank. It shows that a legal court consisting of not less than five commissioned officers, more than one-half of whom, exclusive of the president, were senior to the accused, could have been convened without injury to

the service, and the illegal court which was convened could have been avoided without injury to the service. It shows that at the time of the organization of the said court there were twelve naval officers superior in rank to the claimant on waiting orders in the city of Washington, D. C. It shows that Medical Inspector Stephen D. Kennedy, of the navy, was tried in November, 1883, on board the Hartford, at Panama, by a court composed of two commodores, two captains, one medical director, one medical inspector, and one commander. That all these officers were detailed for that special duty by the Navy Department, and were directed to proceed from the city of New York to Panama, this detail being deemed necessary by the Department in view of the fact, of which it was informed by Rear-Admiral Hughes, that there were not in the squadron under his command the requisite number of officers of sufficient rank to organize a court-martial for the trial of Medical Inspector Kennedy. As a part of the history of the times, of which the court will take judicial notice, we invite attention to a letter addressed by the Secretary of the Navy to Senator Rollins, a member of the Senate Naval Committee, bearing date February 11, 1883, just prior to the organization of the court in question. In that letter the Secretary said:

"In any event, it is to be hoped that there will be no repeal of any reformatory legislation of last year. It was wisely decided that the navy should not be enlarged by the addition of a single new officer beyond 2,208 then in the service. There are to-day many more naval officers, old and young, than there is employment for, and the pressure for shore duty is almost unendurable."

If on the 11th of February, 1883, there were many more naval officers, old and young, than there was employment for, what had become of them a few weeks afterwards when this naval court was convened? Could not the

Secretary have avoided an illegal court and relieved himself from that pressure, which was almost unendurable, by detailing more senior officers to go along with the two whom he sent to China? We submit that this evidence, coming from the head of the navy, taken in connection with the admitted facts to be found in the record, shows conclusively that the illegal court of which we complain could have been avoided without injury to the service.

The court below was of opinion that full discretionary power was vested in Rear-Admiral Crosby in the selection of the members of the court-martial and based its decision upon § 143 of the Orders, Regulations, and Instructions for the administration of law and justice in the United States Navy, and upon the decision of this court in Martin *vs.* Mott, 12 Wheaton, 19. We submit that in this view the Court of Claims has fallen into error.

We deny that any official is vested with discretion, in convening a court-martial, to so constitute that court as to make it consist of a majority of juniors to the officer to be tried. If the mere volition of the officer convening the court is to be conclusive, it is in the power of such officer to deprive the accused of a fair and impartial trial and thus, under cover of discretion, the door is opened for malice or jealousy to work a grievous wrong for which there is no remedy. We insist that the law in this respect is *mandatory*. It is a well-settled principle that "where a law is plain and unambiguous, whether it is expressed in general or limited terms, the Legislature should be understood to mean what they have plainly expressed, and consequently no room is left for construction."

Is not this law plain and unambiguous in its terms? Have not the Legislature plainly expressed their meaning? The second clause of article 39, section 1624 of the statute declares: "*But in no case, where it can be avoided without*

injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried." The court will observe the difference between the language here employed and the first clause of the same section, which defines the *number* of officers of which a court shall be composed. The maximum number is fixed at thirteen and the minimum at five; and as many officers not exceeding thirteen as can be convened without injury to the service shall be summoned. Here there is room for the exercise of discretion, so far as the *number* to be selected between five and thirteen is concerned. The *rank*, however, is fixed by language much more restrictive and imperative. "*But in no case* shall more than one-half, exclusive of the president, be junior to the officer to be tried," &c. In other words, an officer shall not be tried by other officers inferior in rank, "where it can be avoided;" that is to say, the trial of a superior officer by a court composed of inferior officers *must "be avoided" if it is possible.* It is not a mere question of convenience or inconvenience, but whether the detail of officers junior in rank to the accused could have been avoided. It is unnecessary to remind the court of the doctrine, which is as old as the law itself, that "where public interests and rights are concerned, or where third persons have a claim *de jure*, the law is *mandatory.*" What greater interest or more valuable right could the public possibly have at stake than the fair and impartial administration of justice in the courts? What higher claim could the accused possibly assert than the right to be tried by his peers, a right hitherto accorded to the meanest criminal in the land?

What a mockery of justice to subject the accused to trial by seven officers, five of whom would be directly benefitted by finding a verdict of guilty and pronouncing a sentence of dismissal? The law interposes its shield, and says this

shall not be done if it can be avoided. And why? The ancient Plowden has said that "the letter of the law is the body; the sense and reason of the law is its soul." What is the sense and reason of this law? It is that Congress understood the wisdom of the prayer, "Lead us not into temptation." They knew very well that human nature is always and everywhere the same, whether clothed in purple or rags, or even a naval uniform. They knew that even navy officers could not be expected always to hold the scales of justice with an even hand when their own individual fortunes were to be advanced or retarded by the judgment to be rendered and the sentence to be pronounced. In enacting the law now under consideration, Congress intended to provide a safeguard against partiality, prejudice, or bias. It intended to throw a shield around naval officers whose commissions are so often liable to be placed in the balance. It intended to recognize the principle which has been imbedded in our jurisprudence—civil, military, and naval—that *every man is entitled to be tried by his peers.* In all causes, civil and criminal, tried in the United States the jury is purged of all bias or prejudice by every means known to the law. No appellate tribunal in this land would allow the verdict of a jury to stand for an hour when it appeared that the jury had been illegally empannelled, and that objection had been made to the illegality in due time and before going to trial. In this and in every other civilized country it is not only illegal, but would be considered indecent, for a judge to preside at a trial in the result of which he had a direct interest.

By reference to our naval laws and usages, it will be seen that whenever naval officers are to be promoted, an examining board is composed of members *all senior to the officer before them.* In all commissions appointed in the Navy to investigate the fitness of officers for retention in the ser-

vice it has ever been the practice, based on law and justice, to compose said commissions of seniors to the party to be examined. In the act of Congress approved July 22, 1861, "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," section 10 says: "*Provided, always,* That no officer shall be eligible to sit on such board or commission whose rank or promotion *would in any way be affected by its proceedings.*" If the proposition for which we contend has been true heretofore, it should be especially recognized at a time like the present, when promotions in the naval service are so much retarded and the temptation to create vacancies is so strong.

Care should be taken now, more than at any past period of our naval history, that in organizing naval courts to try a naval officer for his commission, such officer should not be tried by his juniors, who would be promoted by his dismissal. But we insist that nowhere, and at no time heretofore, has it ever been decided that a trial of a naval officer by a court five-sevenths of whose members are his juniors is legal. So far as we are informed, the action taken in this case stands without a precedent or a parallel in our naval history. As to the question of the rank of the officers composing tne court, we concede that the appointing power has the discretion of limiting his selection to the grade of admiral, commodore, captain, commander, &c., depending upon the rank of the officer to be tried. If a captain is to be tried, he can limit the court to be composed of all admirals or all commodores; or if a commander is to be tried, he can limit the court to all captains. But we deny that he has the discretionary power to organize a court of juniors to try a senior.

We submit that the court below has confounded the exercise of discretion in the selection of the *number* to

constitute a legal court with the *mandate* to be executed in the selection of the *rank* of the officers. The law is mandatory that in no case (when it can be avoided without injury to the service) shall more than one-half, exclusive of the president, be junior to the officer to be tried. In other words, the officer convening a court-martial is to see that all possible means and resources have been exhausted before he is authorized to select a majority of juniors to try a senior. Is there any allegation in this record that the selection of the members of the court, of whom more than one-half were the juniors of the accused, *could not have been avoided?* None whatever. Admiral Crosby, in his order convening the court, has not made that averment; and the fact is, that he could not have made it truthfully. Now, we insist that it should somewhere and by somebody be made first to affirmatively appear that it could not have been avoided, before the accused could be legally tried by a court composed of a majority of his juniors. If any such averment had been made at the trial or in the order convening the court, the record shows that the accused was ready to prove its falsity. The record shows that he protested against the organization of the court as contrary to law, usage and common justice, and had his protest entered before the trial commenced. The record shows an averment on his part that a sufficient number of officers senior to himself could have been ordered upon the court without injury to the service. It shows that he disputed the right of Admiral Crosby to convene for his trial a court of seven, consisting of two seniors and five juniors, and that his plea and protest were overruled.

If Admiral Crosby had averred in his order that the illegal court which he summoned could not be avoided without injury to the service, this was certainly traversable matter, and the accused had a right to disprove it. We

have fallen upon evil times, indeed, if it be true that an admiral in the navy can, in his discretion, organize a court of juniors to try a commander who is their senior. The assumption that the mere discretion of Admiral Crosby in a matter affecting the official life of the accused cannot be questioned or traversed, but must be accepted as final and conclusive, is not only wholly unwarranted, but is in violation of the plainest principles oi justice. As a matter of law and right, the accused should have been permitted to show at the trial that the organization of a court composed of a majority of his juniors could have been avoided without injury to the service, The words "*if it can be avoided*" do not carry with them one particle of discretion. If a thing cannot be avoided, it is an existing fact, and does not admit of the exercise of discretion. The case of Martin *vs.* Mott, relied upon, is, we submit, entirely inapplicable. That was an action of replevin originally brought in the Supreme Court of New York by Mott, defendant in error, against Martin, the plaintiff in error Martin being a deputy marshal of the United States, avowed and justified the taking of Mott's goods by virtue of a warrant issued to the marshal of the district to collect a fine imposed on him by the judgment of a court-martial, described as a general court-martial composed of officers of the militia of the State of New York, in the service of the United States, (six in number and naming them,) duly organized and convened by general orders issued pursuant to the act of Congress of February 28, 1795, for the trial of those of the militia of the State of New York ordered into the service of the United States, in the third military district who had refused to rendezvous and enter into the service of the United States in obedience to the orders of the commander-in-chief of the State of New York, on the 4th and 29th of August, 1814, issued in compliance with the requisition

of the President made in pursuance of the same act of Congress, and alleging that Mott, being a private in the militia, neglected and refused to rendezvous, and was regularly tried by the said general court-martial and duly convicted of said delinquency. The Supreme Court held that the avowry was good.

The court will observe that the question among others before the Supreme Court was with reference solely to *numbers* constituting a legal military court for the trial of an offender, and did not relate to or touch the graver question of *rank*. Mott was not in the military or naval service of the United States, but a private of the militia of the State of New York. The case did not arise under any article of war or regulation of the navy, but under the act of Congress of February 28, 1795, in regard to the militia when called into the active service of the United States. It decided nothing, except as to numbers, and then only as a custom of service, or, as the court expressed it, "the general usage of the military service, or what may not unfitly be called the customary military law." There was no allegation of illegality by virtue of the court being composed of a majority of Mott's juniors, nor was any objection to the composition of the court made at the time of trial. The objection afterwards raised was as to the *number* of officers constituting the court. The court was legal in form and in accordance with the requirements of military law, wherein the number to compose the same was within the discretion of the officer ordering it, provided it should not be composed of less than five nor more than thirteen. The Supreme Court held that as it was a legally-constituted court, (though not composed of the highest number provided for by law,) the complainant had no just cause of complaint. We repeat that the question of the *rank* of the officers, which never was a matter of discretion on the part of any officer convening a military or naval court, did not

arise in the case of Martin *vs.* Mott, and therefore the decision in that case can have no application to this.

Section 143 of the Orders, Regulations, &c., of the Navy already referred to reads as follows:

"It is to be understood however, that the limitation with reference both to the number and rank of the officers constituting the court, is discretionary with the appointing power, and that his decision thereupon is conclusive."

In regard to this, it is sufficient, we think, to say that the regulations made by the Navy Department, can have no binding force or effect whatever, and are mere *brutum fulmen* unless they are in accordance with constitutional and statute law. The Secretary of the Navy has no legislative power. He has no power to repeal or suspend or modify an act of Congress. A naval regulation not in accordance with law cannot be accepted as authority in a judicial proceeding involving the correctness of the regulation itself.

In F. M. Symond's case, 120 U. S., 46, Mr. Justice Harlan, in delivering the opinion of the court, said:

"The authority of the Secretary to issue *orders*, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplemental to, *but not in conflict with*, the statutes defining his powers or conferring rights upon others. *The contrary has never been held by this court.*"

In the second place, we submit that the defects in the composition of the court which have been pointed out have not been cured by the action of the President in approving its sentence of dismissal. If the court was illegal, and all its acts were legal nullities, the mere act of

approval by the President, of the record in such a case fails to clothe the court *nunc pro tunc* with jurisdiction, or to stamp its findings with legality. The ministerial act of the executive in approving the record of a naval court-martial thus illegally constituted is a nullity, and cannot give to the record any additional vitality or force whatever. We insist that the approval by the President, of the sentence of a court illegally constituted and without jurisdiction cannot render that sentence valid.

In Dynes *vs.* Hoover, 20 Howard, 65, the Supreme Court held that "if a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power over it, civil courts may, on the action of a party aggrieved by it, inquire into the want of the court's jurisdiction."

In McBlair's case the Court of Claims, through Judge Weldon, said:

"While the President is made commander-in-chief by the Constitution, Congress has the right to legislate for the army, not impairing his efficiency as such commander-in-chief; and when a law is passed for the regulation of the army having that constitutional qualification, he becomes as to that law an executive officer and is limited in the discharge of his duty by the statute."

In the third place, we submit that the appointment of Francis M. Green, with the advice and consent of the Senate, to fill the office held by the claimant, did not operate in law to supersede the latter, and that the claimant, by virtue of the appointment of the said Green, did not cease to be an officer in the Navy from and after the date of such appointment. We maintain that the President had no power to dismiss the claimant from the service by appoint-

ing another in his place, with the advice and consent of the Senate. Under the Constitution and laws the power of appointment to office is one thing; the power of removal from office is quite another thing. The Constitution provides that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint all officers of the United States whose appointments are not otherwise provided for, and which shall be established by law. But the constitution is silent with respect to the power of removal from office where the tenure is not fixed. In *Ex parte* Hennen, 13 Peters, 257, the Supreme Court say: "In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." But there is no absence of statutory regulation here. On the contrary, we find that Congress has, by the fifth section of the act of July 13, 1866, provided in express terms that "no officer in the military or naval service shall in time of peace be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." The power of the President to supersede Mullan by appointing Green, with the advice and consent of the Senate, can only be maintained upon the ground that the power of removal is an incident to the power of appointment; that inasmuch as the President, with the advice and consent of the Senate, appointed Mullan, the President, with the advice and consent of the Senate, may remove him by appointing another in his place. But the Supreme Court say this can only be done in the absence of constitutional provision or statutory regulation. And the Court of Claims in the case of Lyman B. Perkins *vs.* The United States, speaking through the Chief Justice, uses the following language:

"In curtailment of this implied power of removal, as incident to the power of appointment, section 1229 of the Revised Statutes provides that 'no officer in the military and naval service shall in time of peace be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.'"

Here, then, we have a decision of the Supreme Court that the power of removal can only be recognized as an incident to the power of appointment in the absence of constitutional provision or statutory regulation, and we have a decision of the Court of Claims that section 1229 of the Revised Statutes has been enacted as a statutory regulation in curtailment of this implied power of removal as incident to the power of appointment. Did Congress have the constitutional power to adopt this statutory regulation? We submit that it had. Section 8 of Article 1 of the Constitution provides that Congress shall have power to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces. The fifth section of the act of July 13, 1866, is only one of many rules made by Congress for the government and regulation of the naval forces. The navy is the creature of Congress. It owes its creation and continued existence to the action of Congress. Congress has from time to time enacted rules for its regulation and government. Congress has instituted naval courts, defined offenses, and prescribed their punishment. Congress has established the different offices in the navy, has prescribed how those offices are to be filled and how they are to be vacated. Congress has undertaken to regulate the manner in which officers of the navy can be removed. In its wisdom and in the exercise of a constitutional grant which has never been questioned, Congress has seen fit to throw the mantle of its protection over the officers of the navy by providing that they shall not be dismissed from the service in time of peace except upon

and in pursuance of the sentence of a court-martial to that effect. If, then, the act of 1866, be constitutional, it was violated in the case of Mullan, and the illegal action of the President cannot be cured by the advice and consent of the Senate, for the Constitution nowhere provides for any participation by the Senate in effecting the removal of a navy officer from his office. "The power of removal from office was a subject much disputed and upon which a great diversity of opinion was entertained in the early history of the Government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the power * * * but it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution." (*Ex parte* Hennen, 13 Pet., 259.)

If the Senate ever had the right to participate in removals from office, it must have derived that right from the Constitution; and if that be true, the right has existed since the adoption of the Constitution. It has been coeval with the existence of the Senate. Did the Senate surrender that right when it concurred in the passage of the act of 1862? The seventeenth section of the act of July 17, 1862, provides that "The President of the United States be and hereby is authorized and requested to dismiss and discharge from the military service, either in the army, navy and marine corps or volunteer force, any officer for any cause, which in his judgment, either renders such officer unsuitable for or whose dismission would promote the public service." The effect of that section was to vest the sole power of removal in the President. If the Senate supposed that it had the right to participate in removals from office, it clearly surrendered that right when it concurred in the

passage of the act referred to. Did it intend to recover and recall that surrendered right, by the passage of the act of July 13, 1866? Did it intend to lay down a constitutional obligation in 1862, and take it up again in 1866?

All experience has shown that the Senate has ever been too jealous of its constitutional prerogatives to surrender any one of them for a single moment, either in time of peace or in time of war. It is a matter of public history that the Senate of the United States never claimed the right to participate in removals from office until the political troubles which arose during the administration of President Johnson. It was then for the first time that the right was asserted, and the reasons therefor were perfectly well understood. The Congress in both branches were determined, if possible, to prevent the President from removing certain incumbents from office. Accordingly, in March, 1867, they passed an act declaring that "every person holding any civil office to which he has been or may hereafter be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he was appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided." That act was repealed at a recent session of Congress with great unanimity. This is a significant circumstance to show that the act was unconstitutional and void from the beginning, and that in the judgment of the Senate they never had the right to participate in removals from office.

After the passage of the act of July 17, 1862, Congress, supposing perhaps that wrongs may have been committed under its provisio.. passed an act on March 3, 1865, (13

Stats., 489,) which provided that in cases where officers had been wrongfully and unjustly dismissed, they should have a hearing before a court-martial, and if said court should not award dismissal, the order of dismissal should be void. How void, if the Senate had already participated in the removal by giving its advice and consent to the nomination of another to fill the same place? This act of March 3, 1865, was worse than useless if it be true that notwithstanding its provisions an officer could be superseded by the appointment of another with the concurrence of the Senate.

It having been settled, as we think, that the Senate cannot participate in the removal of officers appointed with the advice and consent of the Senate, and that the power of removal is vested in the President alone in the absence of constitutional provision or statutory regulation, Congress thought proper on the 13th of July, 1866, to adopt a statutory regulation curtailing the power of the President and providing that no officer in the military or naval service shall, in time of peace, be dismissed from the service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. In view of that statute, could Congress have intended that an offense which would subject an officer to dismissal should be investigated by a court-martial before the President could dismiss, but that the President and Senate could jointly dismiss without any investigation of the alleged offense? Can it be true that the President is inhibited from doing a possible wrong, but that he may be permitted to perpetrate it if the Senate will give its advice and consent?

In the case of Blake *vs.* the United States, 103 U. S., 227, followed in Keyes *vs.* the United States, 109 U. S., 339, it was held that the President had power to supersede

or remove an officer of the army by the appointment of his successor with the advice and consent of the Senate. Mr. Justice Harlan, in delivering the opinion of the court, after quoting the 5th section of the act of July 13, 1866, says:

"Two constructions may be placed upon the last clause of that section without doing violence to the words and giving them a literal interpertation, it may be construed to mean that, although the tenure of army and naval officers is not fixed by the Constitution, they shall not in time of peace be dismissed from the service under any circumstances, or for any cause or by any authority whatever, except in the pursuance of the sentence of a court-martial to that effect or in commutation thereof. Or in view of the connection in which the clause appears—following, as it does, one in the same section repealing provisions touching the dismissal of officers by the President alone, and to assignments by him of the command of troops, without regard to seniority of officers; it may be held to mean that, whereas under the Act of July 17, 1862, as well as before its passage, the President alone was authorized to dismiss an army or naval officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote the public service, *he* alone shall not thereafter in time of peace, exercise such power of dismissal except in pursuance of a court-martial sentence to that effect or in commutation thereof. Although this question is not free from difficulty, we are of opinion that the latter is the true construction of the Act."

We submit that there is a manifest distinction between the Blake case and that now under consideration. Alexander Gilmore was appointed post chaplain in the army from private life, *vice Blake, resigned.* In making the appointment the President exercised his constitutional power which carried with it as the court held, the supersedure of Blake. But in the appointment of Mullan's successor, the statutory system of promotion which has long been the subject of legislation, was carried out. An important part

of that system for the regulation of the tenure of the office of a naval officer is to be found in section 1229 of the Revised Statutes. The act of the President in nominating Mullan's successor being expressly based on the supposed dismissal, when in point of law there was no dismissal was a nullity.

The record in this case shows that Commander Mullan was dismissed, not by the nomination of Commander Green and his appointment with the advice and consent of the Senate, but by the approval by the President of the sentence of the so-called court. The record shows that the proceedings of the court reached the Secretary of the Navy on the 5th day of July, 1883; that on the 6th day of July, 1883, the same was laid befors the President for his action, and that Mullan was officially notified on the 6th day of July, 1883, of the President's approval of the sentence of the court-martial dismissing him from the navy. It thus appears that Mullan was dismissed from the navy, not by the nomination of another and his appointment with the advice and consent of the Senate, but by the action of the President approving the sentence of an illegal court-martial. That was the initial wrong. But for that wrong the name of Mr. Green would not have been sent to the Senate. The subsequent action of the President and the Senate was based upon the action of the President in approving the sentence of the illegal court-martial. If that action was illegal, the subsequent action based upon it was illegal also. If the foundation is overthrown, the superstructure must fall with it.

The 5th amendment to the Constitution provides that no person "shall be deprived of life, liberty, or property without due process of law." The commission of the complainant as commander in the Navy was his property. It was the only property he had. Can it be said that a pro-

ceeding had before an illegal court, by which he was deprived of his property, was "due process of law" within the meaning of the Constitution? If he could be legally tried by a court consisting of a majority of juniors, why was it necessary for the Secretary to send out to China two seniors as members of the court? Why not order him to be tried by a court composed entirely of juniors? The presence of the two seniors afforded no security to the accused. They fulfilled no provision of law, and gave no legal character to the composition of the court. The fact remained that the accused was in the hands of his juniors and not of his peers. They controlled the action of the court, and they were the arbiters of his destiny. An able constitutional lawyer, who has been for many years and is now a member of tho Senate, when speaking of military courts, in open session, on the 16th of December, 1882, said "the law under the Constitution has always provided that the trials shall be by an impartial tribunal—persons absolutely removed from any temptation of gain or loss in consequence of their verdict. *They must be officers above the grade and rank of the person on trial.*"

We invoke the benefit of that wise and salutary law in this case.

Very respectfully,

JOHN GOODE,

Attorney for Appellant.

Office Supreme Court U. S.
FILED,
APR 15 1891
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1890.

HORACE E. MULLAN
vs.
THE UNITED STATES. } No. 330.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1890.

HORACE E. MULLAN
vs.
THE UNITED STATES. } No. 330.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

THE COURT OF CLAIMS HAD NO JURISDICTION.

If the claimant's theory of his case is correct, namely, that Congress has regularly appropriated the money to pay his salary as a commander in the United States Navy for the whole period covered by this suit, it is not easy to see how the United States is in any default. It is some disbursing officer, if any body, who is in default, but not the Government of the United States, *which has confessedly done all that it could do.*

If the claimant had recovered judgment in the court below, and this court had affirmed that judgment, satis-

faction could be had only through an appropriation which, after all, some officer of the Government might refuse to carry out, so that the claimant is, on his own theory, just as well off now, with the money appropriated for him lying in the Treasury for his benefit, as he would be under another appropriation to carry out a judgment of the Court of Claims. The former appropriation is just as controlling as the latter could be.

The United States does not submit to suit in the Court of Claims in a case where it has made ample provision for payment of a claimant's demand. In such a case, if satisfaction of the demand is not made, it is not the default of the United States but the default of some officer who should be made to perform his legal duty by the writ of mandamus, at the suit of the United States, acting on the relation of the party aggrieved.

That is the regular, appointed way to compel payment of a certain sum of money appropriated by Congress for the payment of a claim the amount and justice of which are recognized by Congress in making the appropriation. In such a case Congress has decided for itself both the justice and the amount of the claim, and there is no discretion left to anyone, and the duty to pay the money appropriated is *purely ministerial*. This is well settled.

Comm. v. *Johnson*, 2 Binn., 279.

Apgar v. *Trustees*, 34 N. J. (Law), 308.

State v. *Holliday*, 3 Halst., 205.

Nichols v. *Comptroller*, 4 Stew. & P., 157.

II.

JURISDICTION OF THE COURT-MARTIAL.

This court can not look into the expediency or propriety of the order constituting the court-martial without invading a discretion reposed elsewhere by Congress. Upon this point we have nothing to add to the opinion of the Court of Claims (pp. 7–9).

III.

THE CLAIMANT OUT OF THE NAVY IN ANY VIEW OF THE CASE.

According to Finding VIII the President in December, 1883, nominated to the Senate Lieut. Commander Francis M. Green to be a commander in the Navy from the 7th of July, 1883, *vice* Commanders T. H. Eastman, retired, and Horace E. Mullan, dismissed, and on January 18, 1884, the Senate advised and consented to the appointment of Lieut. Commander Francis M. Green to be a commander in the Navy, and on January 23, 1884, the President commissioned him accordingly (p. 7).

This action of the President and Senate seems to have removed Mullan from the service. The cases of *Blake* v. *United States* (103 U. S. 227) and *Keyes* v. *United States* (109 U. S. 236) settle that proposition, we apprehend.

It is submitted that there does not appear to be error in the judgment.

WM. A. MAURY,
Assistant Attorney-General.

140-240

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 330.

HORACE E. MULLAN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 24, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 330.

HORACE E. MULLAN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1890.

1 In the Court of Claims.

HORACE E. MULLAN
vs.
THE UNITED STATES. } No. 14603.

I.—*Petition.* *Filed June* 3, 1885.

Your petitioner, Horace E. Mullan, respectfully represents the following state of facts constituting his claim against the United States:

1st. On the 8th day of February, 1875, he was duly appointed and commissioned a commander in the Navy of the United States, and as such commander he was entitled to pay at the rate of one hundred and ninety-one and two-thirds dollars per month.

2d. That your petitioner claims he has ever since the said 8th day of February, 1875, remained and continued to be a commander in the United States Navy, and entitled to his said pay of one hundred and ninety-one and two-thirds dollars per month.

3d. That the United States has paid your petitioner as such commander up to the 7th day of July, 1883, and from and since the said last-mentioned date has wrongfully and illegally withheld payment from him.

2 4th. That such pay so illegally and wrongfully withheld from your petitioner amounts on the 1st of June, 1885, to the sum of four thousand three hundred and sixty-one and fifty-three one-hundredths dollars.

5th. That such payment has been illegally withheld on the following state of facts, to wit:

On the 18th day of February, 1883, he was in command of the United States ship "Ashuelot" when the said ship was lost off the coast of China; that the loss of the ship was not due to any fault or negligence of your petitioner; that after the loss of said ship Rear Admiral Clitz, then commanding the Asiatic station, convened a naval court of inquiry to investigate and report the facts attending the loss of said ship; that upon the report of said court of inquiry Rear Admiral Clitz communicated to the Secretary of the Navy that he had not officers of the proper rank to organize a legally constituted naval court martial, and that therefore a legal court was impossible; that upon receipt of this communication from Rear Admiral Clitz the Secretary of the Navy detailed two captains senior in rank to your petitioner to proceed from the city of Washington to China; that these officers reached China and reported for duty to Rear Admiral Crosby, who had succeeded Rear Admiral Clitz; that thereupon Rear Admiral Crosby, in disregard of the law and the rights of your petitioner, issued an order convening a court to be composed of the following officers: Captain William P. McCann, Captain Joseph N. Miller, Lieutenant Commander George D. B. Glidden, Lieutenant Commander Edwin S. Houston, Lieutenant John J. Hunker, Lieutenant Seth M. Ackley, and Lieutenant Boutelle Noyes; that the two first-named members of the court were senior

in rank to your petitioner and the other five were junior. By reason whereof your petitioner charges that said court was an illegal court and its sentence was a nullity.

3 That the law regulating courts martial in the navy will be found in the thirty-ninth article of section 1624 of the Revised Statutes, page 283, and is in the following words:

"A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members, and as many officers, not exceeding thirteen, as can be convened without injury to the service shall be summoned on every such court; but in no case where it can be avoided without injury to the service shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside, and the others shall take place according to their rank."

That a legal court martial could have been convened consisting of a majority of members senior in rank to your petitioner "without injury to the service;" that a majority of such court could have been sent from Washington, without injury to the service, as well as two of its members.

That in obedience to orders he appeared before said court thus organized, and before any other proceedings were taken he demurred to its jurisdiction, both as to his person and the subject-matter; that he protested against the organization of the court as contrary to law, usage, and common justice, and had his protest entered upon the records of said court in due time and before the trial commenced. It was in the following words, to wit:

"I object to and protest against the organization of the court as a whole, and for the following reasons: In case of an officer to be tried by court martial, article 39 of the articles for the Government of the United States Navy provides that in no case where it can be avoided without injury to the service shall more than one-half, exclusive of the president, be junior to the officer to be tried. In time of war it might frequently occur that officers, particularly those of the higher grades, could not be detached from duty and ordered as members of a court without great injury to the service; but in time of peace, when large numbers of officers are either off duty or perform-

4 ing such duty as for the necessary time might be done by a subordinate, no such emergency can possibly arise. It cannot be claimed by any one that a sufficient number of officers senior to myself could not have been ordered upon this court without injury to the service. I have no desire to reflect on any individual member of this court; but since my professional reputation, my personal character, and the prosperity and happiness of my family are at stake, I must emphatically protest against being tried by a court five of whose seven members are junior to myself."

That this plea and protest to the jurisdiction of the court was overruled, and your petitioner excepted to the ruling of the court.

That the sentence of this illegal court martial was dismissal from the navy.

That the proceedings of this court were immediately transmitted to the Secretary of the Navy, reaching him on the 5th day of July,

1883. On the 6th day of July, 1883, the same were laid before the President of the United States for his action, and your petitioner was officially notified by letter dated 6th day of July, 1883, of the President's approval of said sentence of the court martial dismissing him from the navy.

That on the 5th day of July, 1883, your petitioner, by counsel, requested the honorable Secretary of the Navy to grant him sufficient time to carefully read the record and prepare a written argument thereon. The Secretary only granted till noon of the next day, and said at that hour he intended to submit the matter to the President; that this hasty and inconsiderate action of the Secretary precluded the possibility of a proper appeal to the President.

That when requested to review his action of July 6th, 1883, the President replied that he should have been seen before he approved the sentence, and referred your petitioner to the Secretary of the Navy.

That upon these facts your petitioner avers that a legal court, consisting of not less than five commissioned officers, more than one-half of whom, exclusive of the president, were senior to the accused, could have been convened without injury to the service, and the illegal court which was convened could have been avoided without injury to the service.

That one member of the said court, according to facts believed in China, would be promoted and the other four junior in rank advanced in grade by the dismissal of your petitioner.

That he had not a fair and impartial trial; that he had no day in court, because, in legal contemplation, there was no court; that the sentence of the court dismissing him from the service was to all intents and purposes a nullity and in violation of the act of Congress approved July 17th, 1876, which provides that "no officer in the military or naval service shall, in time of peace, be dismissed from the service except upon and in pursuance of the sentence of a court martial to that effect or in commutation thereof."

6th. That, the proceedings of said court being illegal and null and void, your petitioner maintains that he is still, and has been since the 6th day of July, 1883, a commander in the United States Navy, duly and legally commissioned as such, and entitled to the pay as aforesaid provided by law.

7th. That your petitioner is justly entitled to his pay as aforesaid; that no assignment thereof or any part thereof has been made, and that your petitioner has at all times borne true allegiance to the Government of the United States, and as a true and loyal citizen thereof has not in any way aided, abetted, or given encouragement to rebellion against said Government.

8th. That he asks judgment against the United States for the said sum of $4,361.53, interest and costs.

HUNTON & CHANDLER,
Solicitors for Petitioner.

WASHINGTON CITY, }
District of Columbia. }

This day personally appeared before me Horace E. Mullan, the above petitioner and claimant, and made oath in due form of law that he has read the foregoing petition; knows the contents thereof; that the facts therein stated upon his personal knowledge are true, and those stated upon information derived from others he believes to be true.

Given under my hand and notarial seal this 1st day of June, 1885.

[SEAL.] WILLIAM G. MOORE, *N. P.*

H. E. MULLAN,
413 *G Street Northwest.*

6 II.—*Traverse. Filed June* 24, 1885.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the — herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Att'y General.

7 III.—*Demurrer. Filed November* 26, 1886.

And now come the said defendants, by their Attorney General, and, demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

ROBERT A. HOWARD,
Ass't Att'y General.

IV.—*Argument upon and Withdrawal of Demurrer. February* 28, 1887.

At a Court of Claims held in the city of Washington on the 28th day of February, A. D. 1887.

The demurrer in this case was argued by Mr. Cochran, for the defendants, for the demurrer, and by Mr. Goode, opposed, and demurrer was withdrawn.

8 V.—*Argument and Submission of Case on the Merits. Dec. 13th and 14th, 1887.*

At a Court of Claims held in the city of Washington on the 13th and 14th days of December, A. D. 1887, this case was argued by Mr. Goode and Mr. Hunton for the claimant, and by Mr. Cochran for the defendants, and submitted.

9 VI.—*Findings of Fact and Conclusion of Law. Filed by the Court Jan'y 3, 1888.*

At a Court of Claims held in the city of Washington on the third day of January, A. D. 1888, the court filed the following findings of fact and conclusion of law, to wit:

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

February 8, 1865, the claimant was commissioned a commander in the United States Navy, and served therein until July 6, 1883.

II.

February 18, 1883, he was in command of the United States steamer Ashuelot, attached to the Asiatic squadron, under the command of Rear Admiral Clitz. On the morning of that day the steamer ran upon a rock and was lost, with eleven of the crew.

III.

March 16, 1883, the Navy Department received a message by cable from Rear Admiral Clitz, sent from Hong Kong, as follows:

Inquiry finished; Mullan culpable; others exonerated; court martial impossible; directions requested.

March 19, 1883, in response to this telegram, orders were issued by the Navy Department to Captains William P. McCann and Joseph N. Miller and Master Samuel C. Lemly to proceed to Yokohama, Japan, and report to the commander-in-chief of the Asiatic station.

These orders were issued to enable the commander-in-chief to organize a court martial for the trial of the claimant because of the loss of the Ashuelot.

IV.

April 30, 1883, Rear Admiral Pierce Crosby, who had assumed command of the United States squadron on the Asiatic station, ordered a general court martial to convene on board the flag-ship Richmond, at Hong Kong, at 10 o'clock a. m., May 2, 1883, for the trial of the claimant. Said court was composed of the following officers, any five of whom were empowered to act: Capt. William

P. McCann, Capt J. N. Miller, Lieut. Commander G. B. D. Glidden, Lieut. Commander E. S. Houston, Lieut. J. J. Hunker, Lieut. S. M. Ackley, and Lieut. B. Noyes. In the order convening the court Rear Admiral Crosby stated that "no other officers than those named can be assembled without manifest injury to the service."

10 V.

When the court convened the claimant filed a protest as follows:

I object to and protest against the organization of the court as a whole, and for the following reasons: In case of an officer to be tried by a court martial, article 39 of the articles for the government of the United States Navy provides that in no case where it can be avoided without injury to the service shall more than one-half, exclusive of the president, be junior to the officer to be tried. In time of war it might frequently occur that officers, particularly those of the higher grades, could not be detached from duty and ordered as members of a court without great injury to the service; but in time of peace, when large numbers of officers are either off duty or performing such duty as for the necessary time might be done by a subordinate, no such an emergency can possibly arise. It cannot be claimed by any one that a sufficient number of officers senior to myself could not have been ordered upon this court without injury to the service. I have no desire to reflect on any individual member of this court; but since my professional reputation, my personal character, and the prosperity and happiness of my family are at stake, I must emphatically protest against being tried by a court five of whose seven members are junior to myself.

VI.

At the time of the organization of the said court there were twelve naval officers superior in rank to the claimant on waiting orders in the city of Washington, D. C.

Medical Inspector Stephen D. Kennedy, of the navy, was tried in November, 1883, on board the Hartford, at Panama, by a court composed of two commodores, two captains, one medical director, one medical inspector, and one commander. All these officers were detailed for that special duty by the Navy Department, and were directed to proceed from New York to Panama, this detail being deemed necessary by the Department in view of the fact, of which it was informed by Rear Admiral Hughes, that there were not in the squadron under his command the requisite number of officers of sufficient rank to organize a court-martial for the trial of Medical Inspector Kennedy.

Found at the request of the claimant.

VII.

Upon the trial claimant was charged with—

(1.) Drunkenness on duty.

(2.) Improperly hazarding the vessel under his command, in consequence of which she was run upon a rock and lost.

(3.) Neglect of duty.

The claimant was found guilty and sentenced to dismissal from the service. July 6, 1883, the sentence was approved and confirmed by the President.

VIII.

December, 1883, the President nominated to the Senate Lieutenant Commander Francis M. Green to be a commander in the navy from the 7th of July, 1883, *vice* Commanders T. H. Eastman, retired, and Horace E. Mullan, dismissed. January 18, 1884, the Senate advised and consented to the appointment of Lieutenant Commander Francis M. Green to be a commander in the navy from the 7th of July, 1883, *vice* Commanders T. H. Eastman, retired, and Horace E. Mullan, dismissed, and on the 23d of January, 1884, the President commissioned the said Lieutenant Commander Francis M. Green to be a commander in the navy from the 7th of July, 1883.

Conclusion of Law.

Upon the foregoing findings of facts the court decides as conclusion of law that the claimant is not entitled to recover.

11 VII.—*Opinion of the Court.*

SCOFIELD, *J.*, delivered the opinion of the court:

The claimant was an officer of the navy with the rank of commander.

February 18, 1883, he was in command of the United States steamer Ashuelot, attached to the squadron on the Asiatic station. On that day the steamer was run upon a rock and lost, with eleven of the crew. The disaster was attributed to the misconduct of the claimant.

A court martial was convened by the commander-in-chief at the station, before which the claimant was arraigned, tried, convicted, and sentenced to dismissal from the service. July 6, 1883, the sentence was confirmed by the President.

The court martial consisted of seven members, five of whom were junior in rank to the claimant. In the order convening the court-martial it is declared that "no other officers than those named can be assembled without manifest injury to the service." At the trial a protest against the organization of the court with a majority of the members junior to the claimant was filed by him.

For this reason the claimant now alleges that the organization of the court martial was illegal and all its proceedings void; that therefore he is still a commander in the navy, and entitled to pay from July 6, 1883.

The court martial was convened under the provisions of section 1624 of the Revised Statutes, which are as follows:

ART. 38. General court martials may be convened by the President, the Secretary of the Navy, or the commander-in-chief of the fleet or squadron. * * *

ART. 39. A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members, and as many officers, not exceeding thirteen, as can be convened without injury to the service shall be summoned on every such court; but in no case where it can be avoided without injury to the service shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside and the others shall take place according to their rank.

This statute directs how a court martial shall be composed, but authorizes a departure from that general direction when it cannot be followed without injury to the service.

It is not denied that the question of possible injury to the service, by a different composition of the court, was considered and passed upon by the officer authorized so to do; but it is contended that he erred in his conclusion, and that this court has power to correct the error by setting aside all the proceedings thereunder as null and void.

Section 143 of the Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy is as follows:

It is to be understood, however, that the limitation with reference both to the number and rank of the members of a general court martial is discretionary with the appointing power, and that his decision thereupon is conclusive.

This regulation, in the opinion of the court, has given to the statute the proper construction, and is in harmony with the decision of the Supreme Court in Martin *v.* Mott (12 Wheaton, 19).

In this case the act of Congress of February 28, 1797, had provided that "whenever the United States shall be * * * in imminent danger of invasion * * * it shall be lawful for the President," etc. This act does not in terms provide that the contingency shall be decided by the President, nor that his decision shall be conclusive of the fact; but the Supreme Court held that "the authority to decide whether the exigency had arisen belonged exclusively to the President, and that his decision was conclusive upon all other persons." In the same case the court lays down the following general rule:

Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

This court has repeatedly held that under the act of July 4, 1864 (13 Stat. L., 394), which authorizes "the commanding officer of an army or detachment" to purchase supplies without advertisement when an emergency exists, that such officer became "the sole judge of when the emergency existed." Baker & Folsom's Case (3 C. Cls.

R., 343), Emory's Case (4 C. Cls. R., 386), Cobb's Case (18 C. Cls. R., 514).

Other questions were raised by the defendants and elaborately discussed by counsel on both sides, but as the court holds that the court martial was lawfully organized and the claimant legally dismissed from the servise it is unnecessary to consider them.

The petition of the claimant will be dismissed.

12 VIII.—*Final Judgment of the Court.*

HORACE E. MULLAN
vs.
THE UNITED STATES } No. 14603.

At a Court of Claims held in the city of Washington on the third day of January, A. D. 1888, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants and do order, adjudge, and decree that the petition of the claimant, the said Horace E. Mullan, be dismissed.

13 IX.—*Application for and Allowance of Appeal.*

HORACE E. MULLAN
vs.
THE UNITED STATES } 14603.

From the judgment rendered in the above-entitled cause on the third day of January, A. D. 1888, in favor of the defendants the claimant, by his attorneys, on the 24th day of January, A. D. 1888, makes application for and gives notice of an appeal to the Supreme Court of the United States.

HUNTON AND CHANDLER,
JOHN GOODE, *Attorneys.*

Filed January 24, 1888.

Allowed in open court.

WILLIAM A. RICHARDSON,
Chief Justice.

January 24, 1888.

14 In the Court of Claims.

HORACE E. MULLAN
vs.
THE UNITED STATES } No. 14603.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court